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IN THE

Supreme Court of the United States

No 296 October Term, 1952

ALSTATE CONSTRUCTION COMPANY,
Petitioner

v.

MAURICE J. TOBIN, SECRETARY OF UNITED STATES DEPARTMENT OF LABOR

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

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INDEX TO BRIEF

	Page
Jurisdiction	2
Opinions Below	2
Question Presented	3
Statute Involved	3
Statement	4
Specification of Errors to be Urged	10
Reasons relied on for Granting the Writ:	
I. The decision below, without precedent, introduces an entirely new concept for extending the coverage provisions of the Fair Labor Standards Act	11
II. The decision below in in conflict with a decision of the Court of Appeals for the Tenth Circuit and with a more recent decision of the Supreme Court of Pennsylvania	21
III. A further conflict has developed in the Court of Appeals for the Eighth Circuit	29
IV. The decision below involves an important question of federal law	30
V. The sweep of the injunction, as affirmed by the Court below, is too broad	31
Cases:	
Adams v. Wewoka Brick & Tile Co. (E.D. Okla., 1942), 5 Labor Cases, para. 61,069	20
Chapman v. Home Ice Co. of Memphis, 136 F. 2d 353, 355	30

Maurice J. Tobin, Secretary of Labor, United States Department of Labor v. E. C. Johnson, d/b/a Bramhill Company, decided July 17, 1952, Eighth Circuit 29
McComb v. Trimmer, 85 F. Supp. 565 (N.J. 1949) 17
McLeod v. Threlkeld, 319 U.S. 419 (1943) 11
Overstreet v. North Shore Corporation, 318 U.S. 125, 63 S. Ct. 494, 496 (1943) 12
Ramos v. P. R. Cement Corporation (P.R., 1946), 10 Labor Cases, para. 63,000, p. 68,775 19
James V. Reuter v. Walling, 137 F. 2d 315 (5th Cir., 1943), 321 U.S. 671, 88 L. Ed. 1001 (1943) 19
E. C. Schroeder Company, Inc. v. Clifton, et al., 153 F. 2d 385 (10th Cir., 1946), cert. den. 328 U.S. 858, 66 S. Ct. 1351 12
Adam Thomas v. Hempt Brothers, 371 Pa. 383 (1952) 21
Walling v. Jacksonville Paper Co., 317 U.S. 564, 63 S. Ct. 332, 337 31
Walling v. Craig, 53 F. Supp. 479 (Minn. 1943) 15, 16
Wiley v. Stewart Sand & Material Co., 206 S.W. 2d 362, 365, 366 (Kansas City Court of Appeals, Missouri, 1947) 18
Zehring v. Brown Materials, Ltd., 48 F. Supp. 740 (S.D. Calif., 1943) 20

STATUTES AND MISC.:

28 U.S.C. Sec. 1254 (1) 2
Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, 29 U.S.C.:
Sec. 15(a) (2) 4
Sec. 15(a) (5) 4
Sec. 201, et seq. 4
Sec. 206 4
Sec. 207 4
Sec. 211(c) 4
Sec. 215(a) (2 and 5) 4

Title 29, Chapter V. Code of Federal Regulations, Part 516 7
House Report No. 1453, 81st Congress, 1st Session, p. 15, dated October 17, 1949 14
Release G-162, Administrator of Wage and Hour Division 20

IN THE
SUPREME COURT OF THE UNITED STATES

No. October Term, 1952

ALSTATE CONSTRUCTION COMPANY,
Petitioner

v.

MAURICE J. TOBIN, SECRETARY OF UNITED STATES DEPARTMENT OF LABOR

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Alstate Construction Company, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Third Circuit, having been rendered on April 9, 1952, and having become final on May 5, 1952, upon which date a timely petition for rehearing was denied, wherein the said Court of Appeals affirmed the judgment of the District Court. On July 11, 1952, upon application of counsel for petitioner, Mr. Justice Burton extended the time for filing petition for writ of certiorari to and including, August 29, 1952.

JURISDICTION

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254 (1).

The opinion of the Court of Appeals for the Third Circuit was filed on April 9, 1952 and a petition for rehearing was denied on May 5, 1952.

OPINIONS BELOW

The opinion of the District Court is reported in 95 F. Supp. 844 and is also printed in the record.

The opinion of the Court of Appeals appears in 195 F. 2d 577 and is also printed in the record.

QUESTION PRESENTED

The question presented by this petition is:

Where an employer is engaged in the production, sale, distribution and application of a bituminous concrete material known as amesite, used solely within the Commonwealth of Pennsylvania in the repair and maintenance of highways, roads and streets over which interstate traffic moves, are those off-the-road employees who perform work essential to the production of the material "engaged in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938, as amended, 29 USCA, Section 201, et seq.?

STATUTE INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, 29 U.S.C. § 201, et seq.) are set forth in the record.

STATEMENT

Respondent brought an action to enjoin petitioner, Alstate Construction Company, a Pennsylvania corporation with its principal office at Harrisburg, Pennsylvania, from continuing alleged violations of the overtime and record-keeping provisions of the so-called Wage and Hour Law, viz., the Fair Labor Standards Act of 1938, Act of June 25, 1938, Chapter 676, 52 Stat. 1060, 29 U.S.C.A., Section 201, et seq., hereinafter called the Act. Respondent sought specifically to enjoin alleged violations of the provisions of Sections 15(a) (2) and 15(a) (5) of the Act, 29 U.S.C.A., Section 215(a) (2 and 5). Those subdivisions of section 15 provide that it shall be unlawful for any person to violate any of the provisions of Sections 206 or 207 as to minimum wages or overtime pay and Section 211(c) as to the record-keeping. The bill charged no violations of Section 206 as to minimum wages.

Petitioner is engaged in the production, sale, distribution and application of a bituminous concrete material known as amesite. Petitioner's employees, facilities, and services are localized *solely* in the Commonwealth of Pennsylvania. Petitioner's three plants, located respectively in the counties of Adams, Mifflin and Schuylkill, produce amesite from exclusively local materials such as limestone, naptha, asphalt filler and lime manufactured and purchased or quarried in the Commonwealth of Pennsylvania (Defendant no longer

receives asphalt from Baltimore at its Adams County plant). This amesite, or bituminous concrete material, is also known as HE, a cold mix, and ID No. 2, a hot mix, otherwise known as macadam black top.

The said bituminous concrete materials, are primarily marketed by petitioner as follows:

(1) Contracts with the Commonwealth of Pennsylvania and many of its political subdivisions for the sale of material and for material and labor for constructing, reconstructing, resurfacing or repairing highways, roads and streets connecting with such highways, all of which are accessible to and regularly used by general vehicular traffic, including traffic moving between points in Pennsylvania and points in other states.

(2) Contracts with interstate railroad companies, commercial and industrial firms engaged in the production of goods for commerce, for sale of material and for material and labor to be used in the construction, reconstruction, repair or maintenance of roads, railroad crossings, parking areas and other facilities of such firms.

(3) Contracts with private persons and others having no interstate activity and not engaged in interstate commerce or the production of goods for commerce, for sale of material and for material and labor to be used in construction, reconstruction, repair and maintenance of road surface.

During the period under consideration (June 30, 1945 through July 30, 1948) over eighty-five percent of the material was used in fulfillment of contracts referred to in categories (1) and (2) above.

Statement

Petitioner employs various classes of employees in its three plants and main office, including plant foreman, field foreman, equipment operators, laborers, semi-skilled laborers, truck drivers, mixers, firemen, watchmen and clerks. Equipment operators are engaged in operating such equipment as spreaders, graders, pavers, shovels, and rollers at times used directly in the work of constructing, repairing, or reconstructing the said highways and roads. Truck drivers are engaged in the following activities:

(1) Haul stone from the Bethlehem, Pennsylvania quarry to the Hanover plant for use in the production of bituminous concrete materials.

(2) Haul the bituminous concrete materials from the company's Naginey and Cressona plants to the job site.

(3) Haul the bituminous concrete materials from the company's Naginey and Cressona plants to the job sites where the material is dumped into spreaders or pavers on the highway for application thereon.

(4) At the Hanover plant the petitioner's truck drivers do some hauling of the bituminous concrete materials from the plant to the job site. Pennsylvania Department of Highways, in some instances, has accepted bids for the said material F.O.B. plant, in which event the material is hauled from the plant to the job in Pennsylvania Highway Department trucks. For the most part, however, the trucking is performed by contract haulers, hauling from the plant to the job site, at an agreed price per ton, which is paid by the defendant.

Laborers and semi-skilled laborers rake amesite on the highways, spread stone base and perform pick and shovel work on roads. At the plants off-the-road employees, including mixers, firemen, watchmen, and clerks, are engaged in, or perform work incident to the production of bituminous concrete materials.

Prior to the decision of the Court of Appeals, most of the employees of the petitioner of the classes above described, were regularly employed in excess of forty hours per week without payment of extra compensation at time and one-half of their regular rate for such overtime hours. Wages are paid throughout the year to many of petitioner's employees, including months during which petitioner's plants do not operate and the employees do not work.

Prior to January 1, 1948, petitioner at its main office and each of its plants, failed to keep proper records as required by Title 29, Chapter V. Code of Federal Regulations, Part 516. Since January 1, 1948, petitioner has kept records showing occupation, day and time of beginning of work week, number of hours worked each day, and number of hours worked each week.

There is no segregation of work performed by truck drivers at the Cressona or Naginey plants in the hauling of road mix produced at these plants for use on existing highways, public roads and streets from other hauling work performed by them; nor is there any segregation of work performed by the so-called off-the-road employees employed at the company's three plants engaged in the production of road mix for use

on existing highways, public roads and streets from other uses for which the road mix is produced.

Respondent contended that employees of the petitioner actually engaged in the construction, repair, reconstruction, extension and maintenance of interstate highways, public roads and interstate railroads which are regularly used for interstate transportation are engaged "in commerce" within the meaning of the Fair Labor Standards Act of 1938; also, that employees engaged in manufacturing and hauling road mixes produced at petitioner's plants for use on interstate highways are engaged "in the production of goods for commerce"; also, that truck drivers who haul raw materials or ingredients to defendant's plants producing road mixes for use on interstate highways are engaged "in the production of goods for commerce".

Petitioner, while admitting that its employees actually working on the highway or other instrumentality of interstate commerce itself, applying amesite in the repair or maintenance thereof as distinguished from original construction, are within the protection of the Fair Labor Standards Act, contends that its employees engaged in the construction of new highways and its off-the-road employees do not have such immediacy of participancy in interstate commerce as to bring them within the coverage of the said Act.

The District Court found "that the various plants of the defendant (petitioner) were all component parts of an integrated unit, eighty-five and one-half percent of whose total output was directed toward the improvement of various interstate facilities and that all of the

employees of petitioner are definitely within the scope of the statute"; *there was no determination as to whether petitioner's employees were engaged "in commerce or in the production of goods for commerce".*

Petitioner appealed to the United States Court of Appeals for the Third Circuit which affirmed the District Court and held that "Alstate's off-the-road employees, in producing material which is used to repair and maintain the surfaces of instrumentalities of commerce are engaged in the production of goods for commerce."

SPECIFICATION OF ERRORS TO BE URGED

1. In holding that petitioner's off-the-road employees, in producing within a state material which is used to repair and maintain surfaces of instrumentalities of commerce in the same state are engaged in the production of goods, for commerce within the meaning of the Fair Labor Standards Act, as amended.

2. In affirming the judgment of the District Court which is so sweeping as to cover even those of petitioner's employees whose activities are totally unconnected with interstate commerce.

REASONS RELIED ON FOR GRANTING THE WRIT

I.

The decision below, without precedent, introduces an entirely new concept for extending the coverage provisions of the Fair Labor Standards Act.

Without precedent, the decision below introduces a new theory for bringing off-the-road employees within the coverage of the Act; namely, that they are engaged "in the production of goods for commerce." Not only is such extension of coverage without precedent, but it is contrary to the decisions of this and other courts, the legislative history of the Act, and, until recently, the Administrator's interpretation of the Act.

In 1943 this Court considered whether a cook and caretaker for a crew engaged in the maintenance of a railroad right of way was engaged in commerce or in the production of goods for commerce and held in *McLeod v. Threlkeld*, 319 U.S. 491 (1943), in its majority opinion by Mr. Justice Reed:

> "McLeod was not engaged in the production of goods for commerce. His duties as cook and caretaker for maintenance-of-way men on a rail-

road lie completely outside that clause. Our question is whether he was 'engaged in commerce,' * * *

"In the present instance, it is urged that the conception of 'in commerce' be extended beyond the employees engaged in actual work upon the transportation facilities. * * *

"We agree with the conclusion of the District Court and the Circuit Court of Appeals that this employee is not engaged in commerce under the Fair Labor Standards Act."

Thus the coverage of the Act was limited to employees engaged in actual work upon the transportation facilities. The law had been settled as to on-the-road employees in *Overstreet v. North Shore Corporation,* 318 U.S. 125, 63 S. Ct. 494, 496 (1943), where it had been held that employees engaged in operating and maintaining privately-owned toll roads and bridges over navigable waterways were "engaged in commerce" and thus the Act covered Overstreet, who operated a drawbridge, along with another employee who sold and collected toll tickets, and a third employee "engaged in maintenance and repair work on the road and the bridge."

In *E. C. Schroeder Company, Inc. v. Clifton, et al.,* 153 F. 2d 385 (10th Cir., 1946), cert. den. 328 U.S. 858, 66 S. Ct. 1351, the action was for overtime of employees engaged in a quarry in mining and processing stone for gravel cushion and riprap in the construction of relocated portions of a railroad and highway. Judge Bratton's opinion at pages 388-389 makes it very plain that the off-the-road quarry employees were not en-

gaged in a process or occupation necessary to the production of goods for commerce, nor were they engaged in commerce:

> "The very language of the Act relating to the production of goods for commerce seems to make it clear that the particular work of the employee, or the integrated effort of which his service is a part, must have for its purpose the production of goods for transportation in commerce. Some goods or some commodities must be produced for movement in commerce. That must be the purpose of the work of the particular employee or of the integrated effort of which his work is a part. * * * Their work was not directed to the production or manufacture of any thing for commerce, within the meaning of the Act. *They were engaged in local business.* * * * Off-the-railroad and off-the-highway employees, working at a remote point in the mining, production and processing of gravel cushion and riprap for use in the construction of relocated portions of the railroad and the highway, are not engaged in the movement of commerce or so closely related to it as to be for all practical purposes a part of it, within the meaning of the Act." (Emphasis added).

And at page 390, the court states:

> "* * * the Act does not speak of the production of goods for an instrumentality of commerce as distinguished from commerce itself. * * * If Congress had intended to extend the coverage of the Act to employees engaged in the production of goods for a railroad or other instrumentality of in-

terstate commerce, even though the goods were not to move in commerce, it certainly would have employed apt words to express the intention."

The Schroeder litigation is of significance in another respect. The other question there considered was the application of the Act to employees who were producing rock to riprap a dike built to protect an oil field from being flooded by a dam which had necessitated the relocation of the highway and railroad. Oil produced in that oil field moved in interstate commerce. The Court held that the employees producing the rock bore such a close and immediate tie to the integrated effort to effectuate the continued movement of oil in interstate commerce, that they were engaged in the production of goods for commerce and thus under the coverage provisions of the Act.

Congress expressly dealt with that situation in its restrictive amendments of 1949 to the Fair Labor Standards Act. The following conclusive statement appears in the House Managers' Report interpreting the Conference Report agreeing to amendments to the Fair Labor Standards Act, House Report No. 1453, 81st Congress, 1st Session, at page 15, under date of October 17, 1949:

"The following are some examples of cases in which the Administrator and the courts will no longer be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production: * * *

"2. Employees of a quarry engaged in mining and processing stone for local use in the con-

struction of a dike located in the same State and who transport such rock from the quarry to the construction site, where the construction of the dike would have the effect of preventing an oil field that produced oil for commerce from being flooded (Schroeder v. Clifton, 153 F. (2d) C.C.A. 10); cert. den., 328 U.S. 858."

It thus appears that Congress expressly considered the Schroeder case, restricted that branch of the decision which had applied the Act to quarry employees, and left stand the other portions of the decision, hereinbefore quoted, holding the Act inapplicable to employees quarrying rock and preparing local materials for use upon interstate transportation lines.

The early case of *Walling v. Craig,* 53 F. Supp. 479 (Minn. 1943) involved facts closely paralleling petitioner's operation. There, defendant "* * * employed several hundred persons in the repair, maintenance and reconstruction of public roads * * *" and entered into and performed many contracts "* * * for the repair, maintenance and reconstruction of public roads and highways owned by said states or political subdivisions thereof. Generally, each section of public road or highway repaired, maintained or reconstructed by defendants and their employees pursuant to said contracts lies wholly within a single State, but each of said sections was a part of a network of roads and highways regularly traversed by vehicles operated by common and contract carriers and private persons for the transportation of persons and property from one state to another * * *" The Court then considered the ap-

plicability of the Act to the following classes of employees and described their duties:

A. Persons engaged upon the roadway;

B. Firemen or boiler operators who operated boilers or retorts connected with railway tank cars;

C. Distributor Truck Drivers and Tank Truck Drivers;

D. Office Employees who handled interstate mail, etc.;

E. Machine shop employees who repaired equipment; and

F. Off-the-Road employees who operated "bituminous mixing plants off-the-road. * * * The work of all such employees operating off-the-road consisted exclusively in the preparation and loading of materials for use within the state on the highway and did not require them to enter upon the highway in question."

The Court held that the persons engaged on the roadway (A), the firemen or boiler operators who operated boilers or retorts connected with railway tank cars (B), the distributor truck drivers and tank truck drivers (C), and the office employees (D), were engaged in commerce and therefore covered, *but* specifically held that the off-the-road employees were "*not* engaged in the production of goods for commerce, or in commerce or in work so closely related thereto as to be practically a part thereof and are not within the coverage prescribed by the Act." (Emphasis added).

The *Craig* case was recently cited with approval and discussed at length in *McComb v. Trimmer*, 85 F.

Supp. 565 (N. J. 1949), where some seven employees engaged in defendants' stone quarry in the production of crushed stone, shale, gravel and sand and in processes and occupations necessary thereto for use in building, repairing and maintaining roads. Judge Forman (at pages 567 and 570) said:

> "Obviously—and the plaintiff concedes it—since defendants' employees are not engaged directly upon, or associated with, any instrumentality of commerce itself, as in the foregoing cases, they are not engaged 'in' commerce. Therefore the plainitff seeks in this case to extend the coverage of the Act to these employees on the theory that since they are employed in producing gravel and shale for use in the repair and maintenance and improvement of county highways, concededly instrumentalities of commerce, they are engaged in the production of goods *for* interstate commerce within the scope of the Act. The plaintiff took the view that certain decisions influenced the Administrator of the Wage & Hour Division, United States Department of Labor, toward such broader coverage. . . . He accordingly, enunciated a new policy on this basis in his Release A-14, issued March, 1945, W. H. Man 1947 . . . induced by the decisions in the so-called 'ice company cases'. * * * There is no more reason to say that they are engaged in the production of goods for commerce than to say they are engaged in commerce. They come strictly within the classification well adopted by other courts of 'off-the-road' employees and are not contemplated for coverage by the Act. Hence

there must be judgment in favor of the defendants."

In *Wiley v. Stewart Sand & Material Co.*, 206 S.W. 2d 362, 365, 366 (Kansas City Court of Appeals, Missouri, 1947), presiding Judge Caye followed the *Schroeder* case, infra, and held that:

"The very language of the Act relating to the production of goods for commerce seems to make it clear that the particular work of the employee, or the integrated effort of which his services is a part, must have for its purpose *the production of goods for transportation in commerce. Some goods or some commodities must be produced for movement in commerce.* * * *

"In the instant case the plaintiffs were engaged in work, the purpose of which was to produce rock for use upon the highways and railroad beds within the State of Missouri. * * * The mere fact that goods produced by others for interstate commerce may be transported over the highways or the railroad tracks, will not bring these plaintiffs within the purview of the Act. Their work was not directed to the *production or manufacture* of anything for commerce, within the meaning of the Act. They were engaged in local business. * * *

"We conclude that the mere fact that plaintiffs were engaged in the production of rock to be used on the highways and railroad beds within the State of Missouri, does not bring them within the Fair Labor Standards Act. They were not engaged in commerce or in the *production* of goods

for commerce. We are supported in this conclusion by an interpretation of the Act given by the Wage and Hour Division of the Government which is charged with its enforcement. The relative part of the interpretation follows:

"'Employees engaged in producing materials such as sand, gravel, asphalt, concrete, macadam or railroad ties, to be used solely within the state in the construction, maintenance, repair, or reconstruction of essential instrumentalities of commerce do not become subject to the Act merely by reason of the use to which such products are put. A typical case is that of an employer who has contracted to repair a highway and has leased a gravel pit near the location of the job. In the pit his employees are engaged solely in digging gravel which is to be used within the state in the repair of the highway. Such employees are not "engaged in commerce" since their operations are of a local nature and are distinct from the construction, repair and maintenance activities in which the materials are used. Neither are such employees engaged in producing goods for commerce.'" (Emphasis added).

See also:

James V. Reuter v. Walling, 137 F: 2d 315 (5th Cir., 1943), opinion of Dist. Ct. reinstated on technical grounds, 321 U. S. 671, 88 L. Ed. 1001 (1943);

Ramos v. P. R. Cement Corporation (not officially reported) (PR, 1946), 10 Labor Cases, para. 63,000, p. 68, 775;

Zehring v. Brown Materials, Ltd., 48 F. Supp. 740 (S. D. Calif., 1943);

Adams v. Wewoka Brick & Tile Co. (not officially reported) (E. D. Okla., 1942), 5 Labor Cases, para. 61,069.

Prior to 1945, the Administrator of the Wage and Hour Division had adopted the same interpretation of the Act which the Courts have adopted. On May 15, 1941, he issued Release G-162, which provides in paragraph VI as follows:

> "Employees engaged in producing materials such as sand, gravel, asphalt, concrete, macadam or railroad ties, to be used solely within the state in the construction, maintenance, repair, or reconstruction of essential instrumentalities of commerce do not become subject to the Act merely by reason of the use to which such products are put. * * * Such employees are not 'engaged in commerce' since their operations are of a local nature and are distinct from the construction, repair and maintenance activities in which the materials are used. Neither are such employees engaged in producing goods for commerce. * * *"

In March of 1945, the Administrator enunciated a new interpretation to the effect that empolyees preparing local materials for instrumentalities of commerce were producing goods for commerce, but prior to the decision in the *Alstate* case, no appellate court had found any basis in the Act for such administrative legislation and had rejected it.

II.

The decision below is in conflict with a decision of the Court of Appeals for the Tenth Circuit and with a more recent decision of the Supreme Court of Pennsylvania.

It rarely happens that a petitioner for a writ of certiorari is in a position to incorporate in his petition an authoritative critique of the decision below. Fortunately, such a critique by the Supreme Court of Pennsylvania is to be found in the case of *Adam Thomas v. Hempt Brothers*, 371 Pa. 383 (1952). There, the plaintiff was an off-the-road employee who ". . . worked for defendant 'in producing, processing, weighing and mixing sand, stones and cement and loading trucks containing concrete and [in] giving directions to [defendant's] truck drivers as to the place of delivery daily of truckloads of sand and cement (concrete) to various customers' of the defendant. The customers were the Pennsylvania Turnpike, the Harrisburg Municipal Airport, the Pennsylvania Railroad Company, the U. S. Army Depot and the U. S. Navy Depot, all of which are located within the State of Pennsylvania. * * * it is readily conceded that the defendant's customers maintained facilities for handling persons or property moving in interstate commerce." The Pennsylvania Court, speaking through Justice Charles Alvin Jones, found that the plaintiff was neither engaged in commerce nor in the production of goods for commerce and thus was not entitled to recover from his employer overtime wages, liquidated damages and counsel fees under the provisions of the

Fair Labor Standards Act. In reaching its conclusion the court considered all of the authorities relied on herein by the petitioner, following which it discusses at length the *Alstate* decision of the court below.

Justice Jones first calls attention to the fact that the court below introduced an entirely new theory for bringing off-the-road employees within the coverage of the Act:

> "The Court of Appeals, in affirming the decree in the *Alstate* case, supra, went considerably further than the District Court had gone and held that '* * * Alstate's off-the-road employees, in producing material which is used to repair and maintain the surfaces of instrumentalities of commerce, are engaged "in the production of goods for commerce."' This decision not only conflicted directly with the ruling in the *Schroeder* case, with respect to 'off-the-road' employees who locally produce and prepare materials for local use in the repair and maintenance of interstate instrumentalities, but it, at once, introduced an entirely new theory for bringing such employees within the coverage of the Act, namely, that they are engaged 'in the production of goods for commerce.' The way in which the learned court reached this conclusion was by reasoning that, inasmuch as *goods in commerce* would be hauled over the highways which were repaired and maintained with materials furnished by the 'off-the-road' employees, the latter were in an 'occupation directly essential to the production' of *such* goods within the intent of Sec. 3 (j) of the Act. The vast num-

ber of purely local employments that would be made subject to the Act on the basis of the theory of the *Alstate* case is not difficult to imagine. It is readily conceivable that many, if not most, local activities are 'necessary', at least in some remote degree, to the production of goods for commerce. Particularly pertinent becomes the caution voiced by the Court of Appeals for the Sixth Circuit, when construing the coverage of the Fair Labor Standards Act in *Chapman v. Home Ice Co. of Memphis,* 136 F. 2d 353, 355 (one of the so-called 'ice' cases), 'We are not unmindful of the fact that a rationalization based upon the doctrine of necessity may, under "The House That Jack Built" technic, lead to absurdity and end by ignoring all practical distinction between "what is parochial and what is national.' ".

The Pennsylvania Court considered the applicability of *E. C. Schroeder Co., Inc. v. Clifton,* supra, and concluded that the interpretation of the Act by the Court of Appeals for the Tenth Circuit was *more logical* than that adopted in the *Alstate* decision:

"When called upon to apply a federal statute, we necessarily give it the meaning which the highest federal judicial authority to pronounce upon it to date has ascribed to it; and, where courts of equal dignity have differed in their interpretations, we naturally accept the decision which to us reaches the more logical conclusion. Accordingly, we choose to follow the ruling of the *Schroeder* case with respect to the 'off-the-road' employees of

the independent contractor for reasons which we shall now express."

and the court brushes aside as unrealistic the suggestion in the footnote of the decision below that the Schroeder case is not in point:

"The difference which the opinion in the *Alstate* case attributes to the *Schroeder* case, wherein it states that the interstate instrumentalities in the latter case were 'new construction', is apparent rather than real. Actually, the work in the *Schroeder* case was not 'new construction' within the contemplation of that term as employed in the Act. It was but a relocation of existing arteries of interstate traffic (viz., a highway and a railroad) made necessary by the Federal Government's construction of the Denison Dam and Reservoir. Thus, it was noted in the Schroeder case (p. 387) that 'The relocated track has been connected with the existing track of the railroad company and has become a permanent part of it. The relocated portion of the highway when completed was or is to become a part of the existing highway but it had not been completed at the time of the trial of this case.' Certainly, the Court of Appeals, which decided the *Schroeder* case, did not regard 'new construction' as being present nor was it assigned as a reason for excluding the particular employees from the coverage of the Act as it should have been, and no doubt would have been, had the work been 'new' construction within the meaning of the Act: cf. *Kelly v. Ford, Beacon & Davis, Inc.*, 162 F. 2d 555 (C. A. 3)."

It would appear that the court below followed the Administrator in relying heavily upon the so-called "ice cases" in being led "inevitably to the conclusion that coverage was intended for off-the-road employees as are here involved." Such an unprecedented extension of coverage is not indicated by such cases. Justice Jones considers the "ice cases" and, as did a majority of the court in the Schroeder case, rejects them as not having any application to off-the-road employees who furnish materials locally for local use:

> "The *Alstate* opinion sought to distinguish the *Craig* case, supra, on the ground that it was decided prior to the Administrator's ruling of March 1945 that employees preparing local materials for local use by instrumentalities of commerce were producing goods for commerce. Incidentally, the *Schroeder* case was decided subsequent to the Administrator's ruling and in evident and authoritative disregard of it. In any event, the ruling was based upon the so-called 'ice cases' which are plainly distinguishable. Yet, one of them *Atlantic Co. v. Walling,* 131 F. 2d 518 C.A. 5) is cited in the *Alstate* opinion as authority for its ruling and two others (*Chapman v. Home Ice Co. of Memphis,* supra, and *Hamlet Ice Co. v. Fleming,* 127 F. 2d 165, C.A. 4) are cited in a footnote. The 'ice cases' were discriminatingly distinguished in the *Schroeder* case where Judge Bratton, speaking for the court, said (p. 389): 'Our attention is directed to the so-called ice cases [citing them]. In all of them, the ice company produced ice and sold it to a railroad company, an express company, or other

like agency, for icing refrigerator cars, icing dining cars, icing shipments of less than car lots, or other similar purpose; and the major contention of the ice company was that since it sold the ice at the point of production to the transportation company, the production was local and therefore its employees were not within the coverage of the Act. That contention was rejected. But in wide difference from the facts here, it affirmatively appears in three of those cases and is fairly inferable in the fourth, that some of the ice actually moved across state lines before being consumed by use or otherwise, and that it was produced and sold with knowledge and intent that it would move in that manner. It is true that in Atlantic Co. v. Walling, supra, the court said in effect that the production of goods for commerce, within the meaning of the Act, includes the production of goods for use by an instrumentality of interstate commerce as an essential part of such commerce, even though the particular goods produced do not move in commerce. But the Act does not speak of the production of goods for commerce as distinguished from commerce itself.' The foregoing distinction of the ice cases was quoted with approval and followed by the District Court for the District of New Jersey in the *Trimmer* case, supra.

"It may be further observed that the portion of the ice so used for refrigeration which was consumed before it crossed the State line veritably entered into and became a part of the goods in commerce whose freshness and edibility it helped

conserve. It was no doubt because of the expected physical relation or reaction between goods in commerce and the ice which refrigerates them that Sec. 1 (3) of the Interstate Commerce Act of 1887, as amended, 49 U.S.C.A. § 1 (3), expressly declared, inter alia, that 'transportation' (interstate) includes ' * * * all services in connection with the * * * refrigeration or icing * * * of property transported.' The very first of the 'ice cases' (sub. nom. *Fleming v. Atlantic Co.*, 40 F. Supp. 654, 661, D.C.M.D. Ga) specifically relied on this statutory declaration of the interstate character of the icing service of goods in commerce. The rationale of the 'ice cases' is obviously not applicable to 'off-the-road' employees who furnish materials locally for local use."

Following a consideration of the "ice cases", the Pennsylvania Court deals with the other cases cited by the court below and dismisses them as not in point:

"The case of *Roland Electrical Co. v. Walling*, 326 U.S. 657, which the *Alstate* opinion cites, is not presently in point. The employees who were there held to be under the Act made parts of electric motors which were used, inter alia, to manufacture goods for commerce. Consequently, under the definition of 'produced' in Sec. 3 (j) of the Act, such employees were held to be in an occupation necessary to the production of goods for commerce. The relation was direct and immediate. In *Lewis v. Florida Power & Light Co.*, 154 F. 2d 751 (C.A. 5), upon which the *Alstate* opinion also relies, the employees of an electrical company whose power

was utilized in commerce and for the production of goods in commerce were likewise held, under the broad definition of 'produced' in Sec. 3 (j), to be in an occupation necessary to the production of goods for commerce. There is no similarity between the facts of these cases and the 'off-the-road' employees of the instant case."

Finally, the Pennsylvania Court recognizes that Congress specifically considered the Schroeder case in connection with its adoption of the 1949 amendments to the Act, and concludes that had it considered the court's holding with reference to the off-the-road employee to be in error, it would have taken action to correct it:

"Finally, we accept the inference drawn in the Schroeder case that 'If Congress had intended to extend the coverage of the Act to employees engaged in the production of goods for a railroad or other instrumentality of interstate commerce, even though the goods were not to move in commerce, it certainly would have employed apt words to express the intention.' This view later received congressional confirmation: see Conference Report on Amendments to the Fair Labor Standards Act, 81st Cong., 1st Sess., 1949, U. S. Code Congressional Service, Vol. 2, pp. 2251, 2252-2254, where the *Schroeder* case was specifically treated with. The portion of the decision in that case which had extended the coverage of the Act to the quarry workers who prepared the rock for building the dike to protect the oil field from flooding was offset and avoided for the future by recommended amendment which became the Act of October 26,

1949, c. 736, Sec. 3 (j), 63 Stat. 911, 29 U.S.C.A. § 203 Pkt. Part."

Thus, it is contended that the decision below is in conflict with the earlier decision of the Court of Appeals for the Tenth Circuit in the Schroeder case, and with the more recent decision of the Pennsylvania Supreme Court—both of which reach the "more logical" conclusion. In view of the confusion which these conflicting opinions will cause in the public mind in connection with a federal legal question in which many employers are interested, it is urged that the petition for writ of certiorari should be allowed.

III.

A further conflict has developed in the Court of Appeals for the Eighth Circuit.

A further conflict has developed as a result of the recent decision of the Court of Appeals for the Eighth Circuit in *Maurice J. Tobin, Secretary of Labor, United States Department of Labor v. E. C. Johnson, d/b/a Bramhill Company,* decided July 17, 1952, and not yet reported, wherein without discussion, the court approved of the decision below. A petition for certiorari is now being prepared and will be filed in this Court in connection with the Johnson case. In order that this question might be finally determined, petitioner urges that the prayer of the Johnson petition be granted.

IV.

The decision below involves an important question of federal law.

In the words of Mr. Justice Jones of the Supreme Court of Pennsylvania:

> "* * * The vast number of purely local employments that would be made subject to the Act on the basis of the theory of the Alstate case is not difficult to imagine. *It is readily conceivable that many, if not most, local activities are 'necessary'* at least in some remote degree, to the production of goods for commerce. * * *"

Thus, the decision is important not only to the petitioner, but to many local employers not presently considered to be under the coverage provisions of the Act. Just as the Administrator in 1945 seized the ice cases as authority for repudiation of his earlier interpretation of the Act, so it is conceivable that the Secretary will now seize upon the *Alstate* and *Johnson* cases to justify further inroads into the local domain. Judge Simons in *Chapman v. Home Ice Co. of Memphis,* 136 F. 2d 353, 355, aptly characterized such extension of coverage as "The House that Jack Built technic".

V.

The sweep of the injunction as affirmed by the Court below is too broad.

The Court below answers the petitioner's objection that the sweep of the injunction is too broad by referring to the language of the injunction. But, if petitioner is to be guided by the language of the decision of the district court as to which of its employees are covered by the Act, it is confronted by the sweeping assertion that since "eighty-five and one-half percent" of its "total output was directed toward the improvement of various interstate facilities", "all of the employees of the defendant [petitioner] are definitely within the scope of the statute".

As was contended in our brief on appeal, we believe that the fundamental error in the opinion of the District Court lies in the fact that the Court chose to view petitioner's over-all operation rather than focus its inquiry upon the work performed by the individual employee: *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 63 S. Ct. 332, at 337. Judge Follmer said *all* of Alstate's employees were covered at a time when he found, for example, that at the Naginey Plant, approximately twenty (20%) percent of the output went into private work. Did Judge Follmer mean that, even those employees who worked on private work during a work week were covered? Should the petitioner be obliged to act at its peril in determining which of his employees are engaged in interstate commerce or in the production

of goods for commerce, *within the meaning of the act?* Judge Follmer's opinion, we believe, is susceptible of interpretation that since 85½% of the total output goes into interstate facilities, *all* employees of Alstate are covered *all* of the time. We do not believe that such a conclusion was intended or would be legally sound, but we do contend that the opinion erroneously suggests a wide departure from the Act and cases decided thereunder which require that the determination of coverage be made upon an individual employee basis.

CONCLUSION

It is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court.

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